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DEPARTMENT OF AGRICULTURE

Office of the Secretary

5 CFR Part 8301

[Docket No. USDA-2019-0005]

RIN 3209-AA48

Supplemental Standards of Ethical Conduct for Employees of the Department of Agriculture

AGENCY: Department of Agriculture, USDA.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Agriculture (“USDA” or “Department”), with the concurrence of the U.S. Office of Government Ethics (OGE), is issuing this proposed rule for attorneys of USDA’s Office of the General Counsel (OGC). This proposed rule further supplements the Standards of Ethical Conduct for Employees of the Executive Branch (OGE Standards) issued by OGE by revising USDA’s existing supplemental regulation concerning the outside practice of law by USDA OGC attorneys. The current regulation requires OGC attorneys to obtain written approval before engaging in the outside practice of law. To more fully address ethical issues unique to OGC attorneys, the proposed revision retains this prior approval requirement and imposes additional restrictions on the outside practice of law, subject to certain exceptions.

DATES: The comment period will be open for 45 calendar days. Written comments are invited and must be received on or before **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: You may submit comments, identified by Docket No. USDA-2019-0005 or the Regulatory Information Number (RIN) 3209-AA48, by any of the following methods:

- *Electronic:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* FederalRegisterComments@usda.gov. Include Docket No. USDA-2019-0005 or RIN number 3209-AA48 in the subject line of the message.
- *Mail, Hand Delivery, or Courier:* Office of the Executive Secretary, USDA Whitten Federal Building Room 116-A, 1400 Independence Avenue, SW, Washington, DC 20250.

Instructions: All submissions must include the agency name and docket number RIN number for this rulemaking. In general, all comments received will be posted without change to <http://www.regulations.gov>. In addition, comments will be available for public inspection and copying at Room 347-W, J.L. Whitten Federal Building, 1400 Independence Avenue, SW, Washington, DC 20250, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning (202) 720-2251.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as account numbers or social security numbers, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Stuart Bender, Director of the Office of Ethics, U.S. Department of Agriculture, at (202) 720-2251, Stuart.Bender@usda.gov.

SUPPLEMENTARY INFORMATION:

Background

On August 7, 1992, OGE published the OGE Standards. See 57 FR 35006-35067, as corrected at 57 FR 48557, 57 FR 52483, and 60 FR 51167. The OGE Standards, codified at 5 CFR part 2635, effective February 3, 1993, established uniform standards of ethical conduct that apply to all executive branch personnel.

Pursuant to 5 CFR 2635.105, executive branch agencies are authorized to publish, with the concurrence of OGE, agency-specific supplemental regulations that are deemed necessary to properly implement their respective ethics programs. On March 24, 2000, USDA, with OGE's concurrence, published in the *Federal Register* an interim final rule to establish the USDA Supplemental Ethics Regulations. 65 FR 15825. The regulation was finalized on October 2, 2000 (65 FR 58635). USDA, with OGE's concurrence, now proposes to amend the USDA Supplemental Ethics Regulations as they relate to OGC attorneys that engage in the outside practice of law.

Summary of Proposed Changes

Section 8301.105 Additional Rules for Attorneys in the Office of the General Counsel

Summary

USDA can, and does, take actions every day that affect enterprises as diverse as farm and ranch production, food safety inspections and the grading of commodities, environmental protection and forest land use, import and export of agricultural products, grocery retailers and supplemental nutrition assistance programs, the national school lunch program, soil conservation, wildfire control, rural development and infrastructure

rebuilding, and promoting the expansion of foreign markets for agricultural commodity exports. In view of the pervasiveness and variety of USDA-regulated and USDA-affected businesses and organizations in the United States, there is a significant risk that OGC attorneys engaged in the outside practice of law may increasingly confront actual or apparent conflicts of interest. USDA therefore proposes to update § 8301.105, which currently requires prior approval for the outside practice of law, to include certain additional restrictions and accompanying exceptions.

Because OGC engages in a wide range of litigation, enforcement, transactional, advisory and regulatory functions across the Department and the nation's agriculture sector, strengthening the requirements for compliance with ethical restrictions is necessary to ensure that a reasonable person will not question the integrity of the OGC attorneys who play an essential role in the Department's programs and operations. OGC would be hindered in fulfilling its mission if members of the public did not have confidence in the ability of its attorneys to act impartially while performing their official duties.

Analysis of the Regulation

Paragraph (a) requires OGC attorneys to obtain prior written approval before engaging in the "outside practice of law," as it is defined in that paragraph. OGC attorneys must obtain the approval in accordance with the existing procedures described in § 8301.102(c) and the standard for approval in paragraph (b).

Paragraph (b) sets out the standard to be applied in reviewing requests for prior approval for the outside practice of law. Approval will be granted unless it is determined that the outside practice of law is expected to involve conduct prohibited by statute,

Federal regulations, including the OGE Standards, or paragraph (c) of this supplemental regulation. This standard is consistent with the standard for approval in § 8301.102(d).

Paragraph (c)(1) prohibits OGC attorneys from engaging in the outside practice of law where the activity, in fact or in appearance, may require the assertion of a legal position that conflicts with the interests of the Department. OGC attorneys are also prohibited from engaging in any outside law practice that might require the interpretation of a statute, regulation, or rule administered or issued by the Department. Attorneys in OGC are also prohibited from engaging in any outside practice of law where a supervisory attorney determines that such outside practice of law would conflict with the employee's official duties or create the appearance of a loss of the attorney's impartiality as prohibited by 5 CFR 2635.802. Further, as prohibited by 18 U.S.C. 205, OGC attorneys may not act as an agent or attorney in any matter in which the U.S. Government is a party or has a direct and substantial interest. Paragraph (c)(2) enunciates certain exceptions from the prohibitions listed in paragraph (c)(1). Paragraph (c)(3) outlines the procedures for the use of those exceptions.

Asserting Contrary Legal Positions

Paragraph (c)(1)(i) is consistent with the rules of professional conduct governing the attorney-client relationship. Precluding any outside law practice that may require the assertion of legal positions adverse to the Department derives from the unique and sensitive relationship between an attorney and a client, which for OGC attorneys is USDA.

Moreover, the Department has a legitimate interest in maintaining the consistency and credibility of the Department's positions before the Federal courts. For the most part,

the representational bans contained in 18 U.S.C. 203 and 205 would preclude outside practice by OGC attorneys in the Federal courts because nondiversity cases within Federal court jurisdiction generally involve controversies in which the United States is a party or has a direct and substantial interest. However, cases may arise involving the interpretation or application of Federal statutes or regulations that do not necessarily implicate the direct and substantial interests of the United States.

As a consequence, OGC attorneys representing private clients might appear in front of the same judges before whom they appear in their official capacities and argue different interpretations of Federal statutes or regulations. Depending upon the visibility of the issues and any attendant controversy, asserting conflicting legal positions may diminish the persuasiveness of the advocate, erode judicial confidence in the integrity of the Department's attorneys, and undermine the credibility of both clients. Section 8301.105(c)(1)(i) is intended, therefore, to safeguard the interests of the Department as the primary client to which the attorney employee owes a professional responsibility.

Concededly, while representing a private client, an OGC attorney might take legal positions on a myriad of issues not directly related to Federal interests or agency programs—such as jurisdiction, service of process, standing, evidence, or statutory construction—that differ from those the attorney might have asserted while acting in a Government capacity. The section is not intended to proscribe instances of outside practice merely because such issues would have been handled differently if the matters arose in the prosecution or defense of an agency case. Generally, advocacy with respect to ancillary issues unrelated to substantive legal positions or agency administered statutes

would be unlikely to have an impact sufficiently adverse to agency interest to be proscribed by the regulation.

Interpreting Department of Agriculture Administered Statutes

Paragraph (c)(1)(ii) is intended to effectuate the prohibition on the use of public office for private gain, to preclude inconsistent legal positions on core issues affecting the interests of the Department, and to protect the public interest by preventing any public perception that an attorney's employment with the Department signifies extraordinary competency on agency related issues, or that an OGC attorney's interpretation implicitly is sanctioned or approved by the Department. For the most part, outside practice involving agency-administered statutes would be precluded as a conflicting activity. If the subject matter of the proposed representation and the assigned duties of the attorney correlate, the outside activity potentially would require, under the standards set forth in 5 CFR 2635.402 and 2635.502, the employee's disqualification from matters so central or critical to the performance of the employee's official duties that the employee's ability to perform the duties of the employee's position would be materially impaired. Similarly, representation on matters involving the application of agency statutes may implicate direct and substantial interests of the United States, thus contravening the representational bans in 18 U.S.C. 203 and 205.

Although the regulation to some extent covers areas that are subject to existing prohibitions, paragraph (c)(1)(ii) reaches situations not specifically addressed in the existing standards. Absent the prohibition contained in this section, an OGC attorney principally engaged in advising a USDA Mission Area or Secretarial Staff Office conceivably could obtain outside employment advising, as opposed to representing, a

private client on areas of agency law to which the attorney is not assigned. In these circumstances, there is considerable risk that the outside legal employment position held by the individual may convey an impression of authoritativeness or access to non-public information or agency experts that may not necessarily be warranted. Moreover, private clients, and those aware of the OGC attorney's involvement, may assume incorrectly that the attorney's interpretation has been vetted through the Department and is effectively a Departmental interpretation as well. Rendering legal services that may require the interpretation of any statute, regulation, or rule administered or issued by the Department creates an appearance that the employee has used the employee's official position to obtain an outside business opportunity. Further, if counsel were engaged in the outside law practice that involved Department statutes, the potential risk for asserting legal positions adverse to the interests of the Department would be heightened. Similarly, as established at 5 CFR 2635.802(b), it would undermine the effectiveness of the attorney and the attorney's duty of loyalty to the Department in those situations where a supervisory attorney determined that the outside practice of law would create a conflict of interest, or the appearance of a loss of impartiality, requiring the attorney's disqualification from matters central to the attorney's performance of his official duties. In such situations, the attorney's duty of loyalty to the Department as the attorney's primary client must take first priority.

Acting as an Agent

Paragraph (c)(1)(iii) highlights the proscription in 18 U.S.C. 205 barring employees from acting as an agent or attorney in any matter in which the United States Government is a party or where the Government has a direct and substantial interest.

Exceptions

Paragraph (c)(2) provides exceptions to the prohibitions set forth in paragraph (c)(1). Consistent with the exceptions to the representational bans contained in 18 U.S.C. 203 and 205, nothing in this regulation precludes representation, if approved in advance by the appropriate official or supervisor, that is: 1) rendered, with or without compensation, to specified relatives or an estate for which an employee serves as a fiduciary; or 2) provided, without compensation, to an employee subject to disciplinary, loyalty, or other personnel administration proceedings; or 3) rendered, without compensation to a voluntary employee nonprofit organization or group (such as child care centers, recreational associations, professional organizations, credit unions or other similar groups) before the U.S. Government under certain circumstances (18 U.S.C. 205 restricts employees from representing an employee organization or group in claims against the Government, in seeking grants, contracts or funds from the Government, or in a judicial or administrative proceeding where the organization or group is a party). Moreover, paragraph (c)(2)(iv) makes explicit that neither the ban on asserting contrary positions nor the prohibition on interpreting agency statutes is intended to proscribe the giving of testimony under oath. In order to take advantage of the exceptions to 18 U.S.C. 203 and 205 for representing family members or an estate, both statutes expressly require the approval of the Government official responsible for the employee's appointment. See 18 U.S.C. 203(d) and 205(e). To take advantage of the other exceptions set forth in paragraph (c)(2), the employee's supervisor must determine that the representations are not "inconsistent with the faithful performance of [the employee's] duties." See 18 U.S.C. 205(d). These approval procedures are detailed in paragraph (c)(3).

Pro Bono

Paragraph (d) permits attorneys in OGC, subject to the restrictions in paragraph (c)(1), to provide outside *pro bono* legal services to organizations or individuals through a non-profit organization, without obtaining prior written approval. For example, Department attorneys may provide legal services *pro bono publico* in areas such as drafting wills or powers of attorney, assisting the preparation of domestic violence protective orders, and landlord-tenant disputes. These *pro bono* activities can generally be undertaken without detriment to the Department's interests, provided that the employee adheres to the limitations of this rule. The Department encourages such volunteer legal activities, if not inconsistent with this supplemental regulation and the laws and regulations described above. Attorneys in the OGC who have questions about whether a specific *pro bono* legal service would comply with the limitations of this rule are encouraged to seek advance guidance from USDA's Office of Ethics.

Matters of Regulatory Procedure

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (the RFA), requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations, unless the head of the agency certifies that the rules will not have a significant economic impact on a substantial number of small entities. The Secretary of Agriculture so certifies. The rule does not impose any obligations or standards of conduct for purposes of analysis under

the RFA, and it therefore does not give rise to a regulatory compliance burden for small entities.

Paperwork Reduction Act

The Department has determined that this rule does not impose any new recordkeeping, reporting, or disclosure requirements on members of the public that would be collections of information requiring approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 5 CFR Part 8301

Conflict of interests, Government employees.

Authority and Issuance

For the reasons set forth in the preamble, the Department is proposing to amend 5 CFR part 8301 as follows:

PART 8301—SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE DEPARTMENT OF AGRICULTURE

1. The authority citation for part 8301 is revised to read as follows:

Authority: 5 U.S.C. 7301; 5 U.S.C. App.; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306; 5 CFR 2635.105, 2635.403, 2635.502 and 2635.803.

2. Revise § 8301.105 to read as follows:

§ 8301.105 Additional rules for attorneys in the Office of the General Counsel.

(a) *Additional rules for attorneys in the Office of the General Counsel regarding the outside practice of law.* Any attorney serving within the Office of the General Counsel shall obtain written approval, in accordance with the procedures set forth in § 8301.102(c) and the standard for approval set forth in paragraph (b) of this

section, before engaging in the outside practice of law, whether compensated or not. For purposes of this section the “outside practice of law” means those activities requiring professional licensure by a state bar as an attorney and include, but are not limited to, providing legal advice to a client, drafting legal documents, and representing clients in legal negotiations or litigation.

(b) *Standard for approval.* Approval shall be granted by the agency designee unless it is determined that the outside practice of law is expected to involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635, or paragraph (c) of this section.

(c) *Prohibited outside practice of law applicable to attorneys in the Office of the General Counsel--(1) General prohibitions.* An employee who serves as an attorney within the Office of the General Counsel shall not engage in any outside practice of law that might require the attorney to:

(i) Assert a legal position that is or appears to be in conflict with the interests of the Department of Agriculture, the client to which the attorney owes a professional responsibility; or

(ii) Interpret any statute, regulation, or rule administered or issued by the Department of Agriculture, or where a supervisory attorney determines that the outside practice of law would conflict with the employee’s official duties or create the appearance of a loss of the attorney’s impartiality, as prohibited by 5 CFR 2635.802; or

(iii) Act as an agent or attorney in any matter in which the U.S. Government is a party or has a direct and substantial interest, as prohibited by 18 U.S.C. 205.

(2) *Exceptions.* Nothing in paragraph (c)(1) of this section prevents an attorney in the Office of the General Counsel from:

(i) Acting, with or without compensation, as an agent or attorney for, or otherwise representing, the employee's parents, spouse, child, or any other person for whom, or for any estate for which, the employee is serving as guardian, executor, administrator, trustee, or other personal fiduciary to the extent permitted by 18 U.S.C. 203(d) and 205(e), or from providing advice or counsel to such persons or estates; or

(ii) Acting, without compensation, as an agent or attorney for, or otherwise representing, any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings, or from providing uncompensated advice and counsel to such person to the extent permitted by 18 U.S.C. 205; or

(iii) Acting, without compensation, as an agent or attorney for, or otherwise representing any cooperative, voluntary, professional, recreational, or similar organization or group not established or operated for profit, if a majority of the organization's or group's members are current employees of the United States or the District of Columbia, or their spouses or dependent children. As limited by 18 U.S.C. 205(d), this exception is not permitted for any representation with respect to a matter which involves prosecuting a claim against the United States under 18 U.S.C. 205(a)(1) or (b)(1), or involves a judicial or administrative proceeding where the organization or group is a party, or involves a grant, contract, or other agreement providing for the disbursement of Federal funds to the organization or group; or

(iv) Giving testimony under oath or from making statements required to be made under penalty for perjury or contempt.

(3) *Specific approval procedures for paragraph (c)(2) of this section.* (i) The exceptions to 18 U.S.C. 203 and 205 described in paragraph (c)(2)(i) of this section do not apply unless the employee obtained the prior approval of the Government official responsible for the appointment of the employee to a Federal position.

(ii) The exception to 18 U.S.C. 205 described in paragraphs (c)(2)(ii) and (iii) of this section does not apply unless the employee has obtained the prior approval of a supervisory official who has authority to determine whether the employee's proposed representation is consistent with the faithful performance of the employee's duties.

(d) *Pro bono activity.* Subject to compliance with paragraph (c) of this section, attorneys within the Office of the General Counsel are permitted to provide outside *pro bono* legal services (without compensation other than reimbursement of expenses) to organizations or individuals through a non-profit organization, without obtaining prior written approval in accordance with the procedures set forth in § 8301.102(c).

Signed:

Stephen Alexander Vaden,

General Counsel, U.S. Department of Agriculture.

In concurrence:

Emory A. Rounds, III,

Director, U.S. Office of Government Ethics.

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